

## HUMAN SERVICES BOARD

# INTRODUCTION

## FINDINGS OF FACT

2. The matter was not finally decided until May of 2001 at which time the Court entered an order and, shortly thereafter, an amended order which reduced the petitioner's

support obligation by over half both prospectively and retroactively for almost a year back to the time of filing. The Court gave the petitioner judgment for \$5,706.24 based on the overpayment and ordered that it be repaid through a 25 percent monthly reduction of the ongoing support amount until the support obligation ended in May of 2003. At that time the ex-wife was to repay the balance through wage withholding of \$93.74 per month for approximately 36 additional months. The balance of the support amount due from the petitioner was to be collected by continued wage withholding.

3. After that judgment was entered, the petitioner asked OCS to (1) stop providing legal services to his ex-wife; (2) stop withholding amounts from his wages each month in excess of his support obligation; (3) provide him with notes from its case file on the court action and transcripts of the Court orders; (4) acknowledge that the younger child actually lives with him; and to (5) follow the "APA rules" when processing actions for review.

4. Following these requests, OCS moved the family court for declaratory relief with regard to its obligations to the two parties and particularly its authority to seek a tax offset. The petitioner was obliged to hire an attorney to defend against this motion.

5. Internally, the Department denied all of the requests and the petitioner appealed through OCS's grievance procedure. After a hearing, OCS issued a written decision in October of 2001 denying the petitioner's request in (1) above explaining that it acted in the child's best interests and not for any particular parent. It explained that number (2) occurred because the petitioner was paid every two weeks, not monthly, resulting in some months of wage overwithholding and some months of under withholding but that the withholding averaged out to the same thing. Work notes under (3) were refused based on the confidentiality of the attorney/client work product. The petitioner was referred to the Family Court for a transcription of the proceedings. OCS answered number (4) by agreeing only that the child lives with the parents as indicated in the Family Court order.<sup>1</sup> With regard to (5) the Department asserted that its policies and procedures do conform with the APA.

6. The petitioner appealed some of those conclusions to the Board. He still wants OCS to stop representing his ex-wife in family court proceedings. He also wants OCS to collect the overpayment made to his wife through tax offset.

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<sup>1</sup> The Family Court order requires the petitioner to continue paying support to his ex-wife as if the child were with her 62.7 percent of the time

He protests that he was not treated according to the Department's rules because the Department filed a motion in court after he filed his request for administrative relief instead of setting up a grievance hearing which forced him to hire an attorney. He also asked the Board to review a dispute he is having with the Department concerning a \$190 payment that he believes is owed to him from a time prior to the Court's order in May of 2001.

7. The parties have indicated that the motion before the Family Court was recently dismissed.

ORDER

The decisions of OCS is affirmed.

REASONS

The gravamen of the petitioner's complaint in this case is that the Office of Child Support Enforcement has chosen to provide free services to his ex-wife which has, in his view, put him at an economic disadvantage. While his ex-wife gets free legal services with regard to child support establishment and enforcement of support rights, he gets none.

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although the child currently spends most of his time with his father.

OCS is the state agency which is "responsible for the operation of the federal IV-D program" under the Social Security Act. 33 V.S.A. § 4101(a) and 4102(a) and (b). Under state statute, OCS is required to provide services for the enforcement of support and related services "upon application of the parent of a minor child". 33 V.S.A. § 4102(c). In so doing, OCS is "guided by the best interests of the child, but not the economic interests exclusively in an action for child support". 33 V.S.A. § 4101(b). Unless a parent is receiving public benefits (which is not the case here), OCS has no independent interest in the establishment and enforcement action in court, other than through the parent it is assisting. Cantin v. Young 170 Vt. 563 (1999).

When OCS undertakes to assist a parent, it develops privity with the parent and cannot act contrary to the parent's interests or wishes. See Cantin, id at 565. Once an OCS lawyer has undertaken to assist one parent, she is constrained by the Code of Professional Responsibility from performing any actions which might breach the confidentiality of that parent or be against that parent's interests. See Code of Professional Responsibility Canons 4 and 5.

Unfortunately for the petitioner, this means that once OCS has undertaken to assist the first parent it is almost

impossible to assist the second parent without using information it obtained in confidence or acting against the interests of the first parent. Thus, OCS could not act to enforce child support through one parent and then assist the other parent with a collection action with regard to the first. That is what the petitioner is asking when he requests that OCS collect the support overpayment owed to him by his ex-wife through tax-offset.

It should be noted that even if OCS were free to take this action, tax offsets are only available to "enforce an order of child support". 15 V.S.A. § 794. "Child support" is defined in the statutes as "periodic payments ordered for the support of dependent children" and "periodic amounts to be applied towards unpaid arrearages". 15 V.S.A. § 780(6). An overpayment of support does not meet that definition. Support overpayments are specifically dealt with in another statute that provides that OCS "may recover an overpayment from the obligee by deducting from future support payments if the obligee has failed to return the excess to the registry". 33 V.S.A. § 4105. This is the remedy that was adopted by the Family Court magistrate to recover the overpayment. The petitioner's ex-wife has been ordered by the Court to repay through a reduction of the current support amount withheld

from the petitioner's wages. There are no other collection remedies for support overpayments in the statute.

The petitioner has also asked the Board to stop OCS from assisting his ex-wife. The Board cannot do that because the petitioner's ex-wife as the parent of a minor child has a right under the above-cited statute at 33 V.S.A. § 4102(c) to obtain services from the Department. The petitioner has no right to interfere with his ex-wife's rights under the statute. OCS has made a decision that she is entitled to services to enforce and establish support. There are no grounds upon which the Board can or should overturn that decision.

The petitioner has also attacked the processes used by OCS with regard to his requests. He objects that OCS filed a motion for declaratory relief in court with regard to his requests before going through the grievance procedure. To be sure, the statutes do contemplate that OCS would use an internal grievance procedure to resolve contested decisions of the office of child support. See 33 V.S.A. § 4108(a). The petitioner was, in fact, afforded this process although his grievance hearing did not occur until after the Motion was filed in Court (but before a hearing was set). No explanation was offered by OCS as to why this Motion was filed before the

grievance was complete. It no doubt cost the petitioner money to file a response to this Motion. At this point, however, it is not clear that the Board can offer any relief to the petitioner with regard to this occurrence. The Board does not have the power to grant monetary damages to persons aggrieved by OCS decisions. 3 V.S.A. § 3091(a) and (d), Fair Hearing No. 16,043. The Court has dismissed the motion and the petitioner has received his grievance hearing and a grievance decision. There is nothing that the Board can order OCS to do in this matter that it has not already done.

The petitioner's final request was the return of a \$190 child support payment he claims he overpaid prior to the Court's decision in May of 2001. That request does not appear to have been before OCS in the prior grievance appeal and the petitioner is notified that he must first request a grievance hearing within OCS before the matter is ripe for hearing before the Human Services Board.

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